Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	
Access to Internet Over	)	GN Docket No. 00-185
Cable and Other Facilities	)	
	)	

REPLY COMMENTS OF UTILICOM NETWORKS LLC

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The commenters in the opening round of this proceeding endorse a variety of contradictory positions. Several incumbent cable operators, including AT&T and Cox, for example, argue against "open access" obligations on both policy and legal grounds, and assert that cable Internet access service qualifies as a statutory cable service. The incumbent local exchange carriers ("ILECs"), on the other hand, while acknowledging the competitive nature of the market for Internet access services, nonetheless assert that the Commission must either treat cable operators as if they were ILECs, or to refrain from regulating ILEC broadband offerings altogether. Finally, the numerous independent Internet Service Provider ("ISP") commenters argue that cable operators are telecommunications carriers that must provide ISPs with common carrier service to end-user customers.

Somewhere within these divergent views lies the path the Commission should follow. All commenters agree, and the law requires, that the Commission should pursue policies that promote investment in new high-speed communications infrastructure and the free, unfettered development

of the Internet.[1] In this respect, there has been no compelling case made by *any* of the commenters for departing significantly from the FCC's current approach.

The market for Internet access services – "broadband" and "narrowband" alike – remains competitive and fast-growing, as the Commission has formally recognized on at least four occasions over the past two years. However, the continued development of these currently competitive markets could be disrupted by the unnecessary injection of regulatory uncertainty such as would certainly result from the imposition of mandatory open access obligations. Such disruption could be especially problematic for new entrant broadband communications providers ("BCPs") such as Utilicom, who are in the early stages of deploying their networks, rolling out services, and winning customers.

Thus, rather than altering BCPs' business and regulatory obligations, the Commission should confine its activity in this proceeding to clarifying the *existing* regulatory framework. Specifically, the Commission should clarify that the cable Internet access provided by BCPs is an information service, the same as Internet access provided by other ISPs such as AOL, Earthlink, MSN Network, and others. Such treatment will assure that all providers are competing on the same, level playing field, and promote the competition that is the objective of this proceeding.

Utilicom's Reply Comments address each of the foregoing points. The first section reiterates the importance of a stable regulatory environment for new entrant BCPs. Indeed, most arguments in favor of "open access" focus on the broad scale and market penetration of incumbent multi-system

[1] *See* 47 USC § 230(b)(2) (declaring that "it is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); 47 U.S.C. § 157 nt (instructing the Commission to take measures necessary to "remove barriers to infrastructure investment").

operators ("MSOs"), and as such are simply inapplicable to BCPs. The second section explains why cable Internet access should be classified as an information service, not as a cable or telecommunications service. Classification as an information service is in keeping with the Commission's historic approach to such services, and assures that all ISP offerings stand on equal footing with other equivalent services. The third section specifically rebuts arguments that cable Internet access should be classified as cable services.

ARGUMENT

I. BCPs Require a Stable Regulatory Environment to Prosper and Grow

As Utilicom explained in its opening comments, BCPs are deploying advanced networks around the country that offer bundled offerings of video, telephone, Internet access, and other services that compete with both the ILECs and incumbent cable operators. As do most other BCPs, Utilicom promotes itself as a direct retailer. Although BCPs have made inroads in the few markets where network builds have actually been completed – such as Utilicom's experience in Evansville, Indiana[2] – BCPs are still in the planning stage in most communities.[3]

As envisioned by essentially all of the commenters in this proceeding, an open access obligation would require BCPs to provide wholesale transport to unaffiliated ISPs. Forcing BCPs to comply with this new regulatory obligation would constitute an unwarranted distraction and could conflict with the business plans of many BCPs who have marketed themselves based on their attractive bundled service offerings. Moreover, to the extent that commenters argue that cable MSOs

[2] *See* Utilicom Opening Comments at 5.

[3] *See also generally* Comments of Millenium Digital Media, Inc., Comments of American Cable Association.

should be obligated to "open" their networks because of their ubiquitous and dominant presence in the broadband Internet access "market," those arguments obviously do not apply to BCPs, who are recent market entrants with little market power. In sharp contrast to BCPs, the incumbent MSOs are established monopolies with large revenue bases, and ready access to the capital markets.

Thus, if the Commission, nonetheless, finds it appropriate to impose an "open access" obligation, it should forbear from doing so on BCPs until BCPs actually establish a strong presence in the market. Doing so before then would conflict with regulatory precedent and would be contrary to the Commission's mandate to pursue policies that promote infrastructure investment. As discussed at greater length below, the Commission has *never* required a non-dominant facilities-based information service provider to unbundle the "telecommunications portion" of its information service offering. There is no basis for the Commission to do so here. Rather, BCPs must be given sufficient breathing room to construct their networks and attract customers before the Commission considers imposing open access obligations.

Finally, the Commission should recognize that providing broadband customers with a choice among several competing ISPs might become a reality without Commission intervention. As part of its Consent Agreement with the Federal Trade Commission, Time Warner has agreed to permit subscribers to choose among at least three unaffiliated ISPs in each of its local markets. And AT&T's on-going trials suggest that it will voluntarily implement a similar approach in the near future. Thus, the market might very well prompt BCPs to provide consumers with open access choices without the need for any government intervention. However, if BCPs do open their networks to competing ISPs, they should do so in response to market forces, not regulatory mandates.

II. Cable Internet Access Is An Information Service

Utilicom's Opening Comments urged the Commission to pursue regulatory policies that differentiate between the *services* customers receive, not the technologies over which those services are provided. Other commenters made similar arguments.[4] Thus, Utilicom argued that cable Internet access should be treated like other Internet access services, including those provided over DSL, satellite or other technologies.[5] As discussed below, the Commission has previously ruled that Internet access qualifies as an information service. There is no reason to treat cable Internet access any differently. Indeed, fair application of the Telecommunications Act, as interpreted by subsequent Commission rulings, as well as prior *Computer Inquiry* precedents, yield the same result.

Section 3(20) of the Act defines "information services" as services provided "via telecommunications" that offer the user the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." 47 U.S.C. § 153(20). The Commission has consistently recognized that Internet access is properly classified as an information service because ISPs offer subscribers "a capability for generating, acquiring, storing, ... retrieving ... and making available information through telecommunications."[6]

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[4] *See, e.g.*, SBC/BellSouth Comments at 8 ("It is the nature of the service, not the name, history, or character of the entity providing it, that determines which Title of the Communications Act applies.").

[5] *See* Utilicom Opening Comments at 13-14.

[6] *See* Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501 (1998), ¶ 77 (quoting 47 U.S.C. § 153(20)) (punctuation in original); *see also* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Order on Remand*, 15 FCC Rcd 385, 401 (1999).

Internet access, like all information services, is provided "via telecommunications," and ISPs typically utilize a wide range of telecommunications inputs. The service that an ISP provides end-user customers, however, is not a telecommunications service and ISPs are not telecommunications carriers. Section 3(46) of the Act defines a "telecommunications service" as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,"[7] and telecommunications carriers are those who provide telecommunications services.[8] Among other things, these definitions clarify that telecommunications services are common carrier offerings.[9] Thus, Internet access cannot constitute a telecommunications service because the Commission has long recognized that information service providers have no common carrier obligations, notwithstanding that their facilities are *capable* of providing telecommunications services.[10]

Most importantly, an information service provider is not transformed into a telecommunications carrier by the use of its own transmission facilities to offer information services – in this case,

[7] 47 U.S.C. § 153(46).

[8] 47 U.S.C. § 153(44).

[9] *See* Cable & Wireless, *Cable Landing License*, 12 FCC Rcd 8516, 8521 (1997).

[10] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384, 423 (1980) (distinguishing between the "basic services" offered by common carriers and the "enhanced services" offered over these carrier's facilities). The Commission has held that the 1996 codification of "telecommunications" and "information" services are mutually exclusive and parallel the definitions of "basic" and "enhanced" services developed in the *Computer II* proceeding. *Report to Congress* at ¶ 39.

Internet access services – to the public.[11] Accordingly, information service providers cannot be obligated to provide common carrier services to unaffiliated ISPs of the sort required by an "open access" regime.[12] The cases cited by the RBOCs are not to the contrary.[13] As discussed above, however, and as the Commission explained at great length in its *Report to Congress*, ISPs provide information *not* telecommunications services; the two are mutually exclusive, *not* overlapping offerings.[14]

Recognizing this crucial distinction is the key to understanding the essential flaw in the arguments made by the RBOC and ISP commenters, who assert that cable operators can be obligated to "open" and "unbundle" their networks. The utilization of telecommunications is a *sine qua non* of an information service offering, but except in limited circumstances not applicable here, that transmission component cannot be treated as a separate telecommunications service.[15] Indeed, none

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[11] *See Report to Congress*,¶ 55. Of course, this is not true of the dominant carriers such as the Bell Operating Companies who use their telecommunications facilities to provide information services.

[12] *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976).

[13] *See* SBC/BellSouth Comments at 28-29.

[14] SBC and BellSouth put the proverbial cart before the horse, however, when they assert that "[t]he Commission's authority to impose ILEC-like open access regulation on cable follows ineluctably from the classification of cable modem service as a telecommunications service provided by a common carrier." *Id.* Certainly BCPs and cable operators function as common carriers when they provide competitive access services, wireless telephone services, and long distance services. Indeed, BCPs are capable of providing a host of other telecommunications services over their flexible networks, including back-haul for unaffiliated wireless providers and other data services. BCPs are not functioning as common carriers, however, when providing Internet access for the simple reason that Internet access is not a telecommunications service.

[15] In the context of evaluating information service providers' obligations to make universal service fund contributions, the Commission framed the issue as follows:

of the RBOC commenters cite any precedent for their underlying claim that non-dominant, facilities-based information service providers must unbundle the telecommunications "component" of their information service offering. They do not do so, of course, because no such precedent exists.[16]

Indeed, the legal implications of the unbundling regime proposed by the RBOC and ISP commenters could lead to absurd results. If all cable and BCP facilities are subject to the unbundling obligations of dominant telecommunications providers, then similar obligations must be imposed on all ISPs whose networks also inherently contain an embedded transport component. Thus,

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> In those cases where an Internet service provider owns transmission facilities, and engages in data transport over those facilities to provide an information service, we do not currently require it to contribute to universal service mechanisms. ... One could argue that in such a case the Internet service provider is furnishing raw transmission capacity to itself. To the extent this means the Internet service provider is providing telecommunications as a non-common carrier, it would not generally be subject to Title II, but it "may be required to contribute to the preservation and advancement of universal service if the public interest so requires."

Report to Congress, ¶ 69 (quoting 47 U.S.C. § 254(e)). Thus, the Commission has ruled that "self-providers" generally are subject to the Commission's permissive USF contribution authority. The Commission has refrained from imposing USF contribution obligations, however, "because telecommunications do not comprise the core" business of information service providers, and because of the administrative difficulties associated with imposing fees on services that do not have a separate price for the underlying "telecommunications" transmission component. *Id.* (quoting *Universal Service Order*, 2 FCC Rcd. 9185 at ¶ 799.

[16] Though the Ninth Circuit purported to recognize that ISP services are information services, *see City of Portland v. AT&T*, 216 F.3d 871, 877 (9th Cir. 2000), the court erred in disaggregating the transmission component of ISP service as a separate telecommunications service. That the court took this approach is revealed in the following, not entirely comprehensible passage: "[t]he Internet's protocols manifest themselves in a related principle called "end-to-end": control lies at the ends of the network where the users are, leaving a simple network that is neutral with respect to the data it transmits, like any common carrier." *Id.* The court also erred when it suggested that the interconnection, unbundling and collocation obligations of section 251(c) apply with equal force to cable Internet access service providers. *Id.* Even if the Internet access service providers are also telecommunications carriers -- which they clearly are not -- section 251(c) only applies to incumbent local exchange carriers, a category that also does not apply to cable operators and BCPs.

heretofore proprietary backhaul and other facilities must be "unbundled" and made available to "requesting carriers" on non-discriminatory rates, terms and conditions. Indeed, the entire Internet backbone would be subject to regulatory unbundling obligations, notwithstanding the Commission's prior determination that these private networks are competitive and should not be regulated.[17]

III. Cable Internet Access Is Not a Cable Service

AT&T and others argue that cable Internet access services should be classified in the same manner as video programming, *i.e.*, as a statutory "cable service." While such a classification may confer some tactical advantages,[18] it is plain that the Internet access service provided by cable operators and BCPs cannot support such a classification.

As amended by the Telecommunications Act of 1996, cable service is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service."[19] The 1996 Act added the words "or use." As none of the commenters argue that cable Internet access qualifies as video programming, the only question is whether cable Internet access qualifies as "other programming service."

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[17] *See generally* Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, OPP Working Paper No. 32 (Sep. 2000).

[18] AT&T clearly is correct that, defined as a cable service, cable Internet access service offerings are immune from the common carriage – type obligations inherent in "open access" obligations. *See MediaOne Group* v. *County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va.), *appeals docketed,* Nos. 00-1680, 00-1709, 00-1719 (4th Cir. 2000) (citing sections 541 and 544 of the Cable Act as precluding the imposition of "open access"-type obligations). As explained above, however, similar regulatory treatment is required if cable Internet access is classified as an information service.

[19] 47 U.S.C. § 522(6) (2000) (emphasis added).

Among other questions, the NOI asked whether the 1996 amendment sufficiently expanded the definition so that cable Internet access services now qualify as statutory cable services.[20] AT&T takes issue with the premise underlying this question, arguing that "[t]he plain language of the pre-1996 statutory definition, as well as the pre-1996 legislative history, show that cable modem services would have been "cable services" even if the 1996 amendment had never been enacted."[21] The argument rests on a snippet of legislative history which suggests that the drafters of the 1984 Cable Act intended the definition to apply to various news services provided by cable operators. *Id.* at 13. Observing that today's Internet also provides news services, AT&T claims that the pre-1996 definition of cable service encompasses Internet access.

This argument has several flaws. First, the availability of news services on the Internet cannot be analyzed in isolation from the array of services that constitute "the Internet," and certainly cannot serve as a basis for defining Internet access service narrowly as a news service to fit within an even narrower statutory definition of cable service. Indeed, The FCC has rejected such narrow, piecemeal analysis. *See Report to Congress* at ¶ 75 ("we believe that Internet access providers do not offer subscribers separate services – electronic mail, Web browsing, and others – that should be deemed to have separate legal status").

Even more importantly, however, a balanced reading of the 1984 Cable Act's legislative history makes clear that the pre-1996 definition did not extend to the types of services now commonly associated with the Internet. The House Report on the legislation emphasized that the Act's definition of "cable service" restricted subscriber interaction to the selection of categories or

[20] NOI ¶ 16.

[21] AT&T Comments at 12.

options provided by the cable operator *itself*, not third parties such as unaffiliated and distant web sites. The Report explained that "[I]nteraction that would enable a particular subscriber to engage in the off-premises creation and retrieval of a category of information *would not fall under the definition of cable service*."[22] The Report further identified several services that would *not* qualify as cable services, including "shop-at-home and bank-at-home services, electronic mail, one-way and two way transmission [of] non-video data and information not offered to all subscribers, data processing, video conferencing, and all voice communications." *Id.* The specific enumeration of these services is dispositive, as they are among the most popular and frequently used services available on the Internet. Obviously, any definition excluding such services from qualifying as cable services would preclude defining the Internet access provided over cable modem platforms as a cable service.

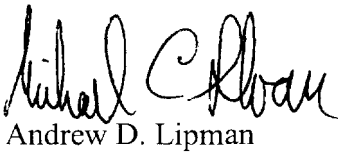
Similarly, whatever the purpose of the 1996 amendment, it clearly was not intended to expand the definition of cable services to encompass Internet access. The 1996 Act left one basic aspect of the definition of cable service unchanged. "Other programming services" remain defined as "information that a cable operator makes available to all subscribers generally." This definition is irreconcilable with the "information" that an individual subscriber obtains via Internet access – *e.g.*, e-mail and/or access to a specific web site chosen by the subscriber. These services are provided to only the particular subscriber who accesses them – indeed, that is the very hallmark of the private, interactive nature of the Internet. It thus seems plain that Internet access provided by BCPs and conventional cable operators does not qualify as a statutory cable service.

[22] H.R. Rep. No. 934, 98th Cong., 2d Sess. 42-43 (1984).

CONCLUSION

For the foregoing reasons, the Commission should adopt policies that encourage investment in broadband communications facilities by assuring that BCPs such as Utilicom are not burdened by the unnecessary regulatory obligations and business distractions that inevitably would follow from the imposition of an "open access" obligation. Rather, the Commission should adopt regulatory policies that level the playing field for all providers of Internet access services.

Respectfully submitted,



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